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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1033

THOMAS H. BROOKS AND AUGUST J. MAUREAU, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 11-15) is reported at 253 F. 2d 362.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1958 and a petition for rehearing was denied on May 7, 1958 (Pet. 2). The petition for a writ of certiorari was filed on May 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported the conclusion that the testimony upon which petitioners' perjury convictions were based related to a material matter.

2. Whether the trial judge properly treated the issue of materiality as one to be decided by the court and whether he properly instructed the jury on that subject.

STATUTE INVOLVED

18 U.S.C. 1621 provides in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals affirming their convictions in the United States District Court for the Eastern District of Louisiana for perjury committed in the course of an official Internal Revenue investigation. Petitioner Brooks was convicted (R. 235-236) under counts 2 and 3 of his indictment, charging that he had falsely sworn that he at no time had been at the residence of Lionel Andrew Dominguez, 1655 North Roman Street, New Orleans, Louisiana (count 2), and that he had at no time, while assigned to the Fifth District, New Orleans Police Department, received any envelopes from Lionel Andrew

Dominguez (count 3). He was acquitted under count 1 charging that he had falsely sworn that he had never driven in petitioner Maureau's automobile and stopped in front of the North Roman Street address (R. 2-4). Petitioner Maureau was convicted under each of three counts of his indictment (R. 236-237), charging that he falsely swore (1) that he had never driven his Nash automobile to 1655 North Roman Street in New Orleans, (2) that he had never been to the residence of Lionel Andrew Dominguez at the same address, and (3) that he never accompanied petitioner Brooks there (R. 5-6, 17-20). Each was given concurrent sentences of eighteen months' imprisonment on the counts of which he was found guilty (R. 235-237).[1]

The pertinent facts may be summarized as follows:

In July 1954, Special Agents Perry and Caballero of the Intelligence Division of the Internal Revenue Service were engaged in an investigation of one Lionel Dominguez, the owner of two lottery enterprises in New Orleans, and various officials of the New Orleans police department. This investigation was for the dual purpose of ascertaining (1) whether Dominguez was evading the 10 per cent federal tax on gross earnings from wagers, and (2) whether officials of the New Orleans police department had received "payoffs" in the period 1949 to 1954 which were not reflected in their income tax returns (R. 50-51, 68-69, 70, 85, 87-88, 97-98,

[1] At a prior trial, each had been found guilty on the first three counts and acquitted under a fourth. The Court of Appeals reversed on the ground that the court erred in ruling that it was for the court and not the jury to determine whether the Special Agent of the Internal Revenue Service who had administered oaths to the defendants had authority to do so. *Brooks v. United States*, 240 F. 2d 905 (C.A. 5).

116, 134-135, 142-143). On July 22, 1954, in connection with this investigation, Special Agents Perry and Caballero went to the home of Dominguez at 1655 North Roman Street in New Orleans and examined his books and records (R. 106, 136). While the agents were there, they arranged with Dominguez to return the next day (R. 106-107, 136).

At about 8:50 a.m. on July 23, 1954, the two agents returned to the North Roman Street address and obtained Dominguez's records from his bookkeeper Cressy (R. 107-108, 137). About 9:05 a.m. the doorbell rang, and Dominguez answered it. The officers observed that petitioner Brooks was standing at the top of the front steps of the house and that petitioner Maureau was standing on the sidewalk near the bottom step (R. 112, 137-138, 139). Petitioners were officers of the New Orleans police department and were on leave from their regular duties that morning (R. 27-31). The revenue officers also observed a green 1946 model Nash automobile, bearing license plate number 152-004, in front of the house (R. 112, 140-141). Dominguez instructed Cressy to hand him a small brown coin envelope. On receipt of the envelope, Dominguez removed $60 from a money bag. Agent Perry marked the bills and Dominguez placed them in the envelope, which he then marked with a distinctive mark. Dominguez went to the door and handed the envelope to petitioner Brooks at the top of the front steps (R. 109-112, 137-140). At about 9:15 a.m., the officers saw both petitioners drive off in the Nash automobile, Maureau at the wheel and Brooks accompanying him (R. 113, 140). The automobile was later identified by its license number as belonging to Maureau (R. 36).

On August 16, 1955 and on August 31, 1955, respectively, Brooks and Maureau were called into the office of the Intelligence Division of the New Orleans District of the Internal Revenue Service. This was not for the purpose of investigating petitioners' tax status, but to determine whether money had passed between Dominguez, as proprietor of the lotteries, and identified high police officers whose tax status was under investigation (R. 117-120). Petitioner Brooks appeared on August 16, 1955, was informed why he had been called to testify, and was placed under oath (R. 39-42). He then proceeded to give voluntary testimony during the course of which he denied (1) ever driving in Maureau's automobile and stopping in front of 1655 North Roman Street; (2) ever being at the residence of Lionel Dominguez at that address; (3) ever receiving any envelopes from Dominguez while assigned to the Fifth Police District; and (4) receiving money from Dominguez on July 23, 1954 (R. 85-96). On August 30, 1955, Brooks was called back to read over his answers. After making one minor change, he was sworn and he signed the statement as true and correct (R. 52-54).

Petitioner Maureau appeared for questioning on August 31, 1955 and the same formalities were followed (R. 55). He denied (1) driving his private automobile to 1655 North Roman Street; (2) ever being at the residence of Dominguez at the same address; and (3) ever accompanying petitioner Brooks to that address (R. 97-103). Maureau returned on September 6, 1955, read over his statement, and signed it under oath (R. 55-56).

After the foregoing evidence had been introduced,

petitioners moved for a directed verdict on the ground that the questions and answers were not material to the investigation which the Internal Revenue Service conducted. The court denied the motion (R. 153-160).

The charge to the jury included instructions covering the presumption of innocence, the concept of reasonable doubt, the elements of perjury which it was the government's burden to prove, and the quantum of proof required. In respect to the issue of materiality of the questions and answers set forth in the indictments, the court instructed the jury as follows (R. 205-206):

> Now it is further incumbent upon the Government to establish beyond a reasonable doubt that the questions propounded by the agent and the answers made by each defenant [sic] were material and relevant and competent to the investigation which they were then and there conducting. Now that is a matter of law. I charge you as a matter of law, that means I do not leave it to you to decide, the Court decides as a matter of law and instructs you that the questions and answers in each of the three counts, in each of the two indictments, were competent, material and relevant to the investigation then and there being conducted by the Internal Revenue Agent who was questioning each of the two defendants.

On the jury's subsequent request, the court gave them additional instructions on various issues pertinent to the case (R. 212-225). One of the jurors then asked the court (R. 225), "Does the jury or the judge have the authority to decide if the sworn statements of the defendants were pertinent to the case which was under

investigation by the Special Agents of the Intelligence Division and has the jury been instructed by the judge that the information that the agents were seeking from the defendants was pertinent to the investigation?" The court replied (R. 225-226):

> Let me answer that.
>
> I charge you as a matter of law—I'll repeat that portion of the charge. I charge you as a matter of law, which means I do not leave it to you to decide but that the court decides as a matter of law and instructs you that the questions and answers in each of the three counts in each of the two indictments were competent, material and relevant to the investigation then and there being conducted by the Internal Revenue Agent who was questioning each of the two defendants. So the Court decides as a matter of law and has decided and so instructs you that the questions and the answers which each defendant gave and which answers are the basis upon which each count is based, were material, relevant, competent and pertinent to the investigation.

ARGUMENT

1. Petitioners challenge the rulings of both courts below that the questions and answers upon which their perjury convictions are based related to a material matter. The evidence established that the Internal Revenue investigation in the course of which the statements were made was designed to ascertain whether Dominguez was evading wagering taxes and whether highly placed New Orleans police officers were receiving payoffs not reflected in their income tax returns. The appearance of petitioners, two police officers, at the

home of Dominguez, and their receipt from him of an envelope containing $60 in currency suggested, at the very least, that there might be a causal connection between the activities of Dominguez, the lottery operator, on the one hand, and petitioners' superiors in the New Orleans police force, on the other, and that petitioners might be middlemen between the subjects of investigation. Had petitioners truthfully answered the questions concerning the events of July 23, 1954, their answers, as the Court of Appeals observed, might "have tended to furnish a link in the chain of circumstances the agents were endeavoring to forge against the police officials under investigation." 253 F. 2d at p. 364. The questions asked were thus material to the inquiry being conducted by the Internal Revenue Service. Compare *United States* v. *Moran*, 194 F. 2d 623, 626 (C.A. 2), certiorari denied, 343 U.S. 965.

2. Petitioners also challenge the trial court's disposition of the issue of materiality (Pet. 6-9). The instruction on this issue (see the Statement, *supra*, pp. 6-7) was correct. Materiality is a question of law to be decided by the court, not the jury. *Sinclair* v. *United States*, 279 U.S. 263, 298-299; *United States* v. *Parker*, 244 F. 2d 943, 950 (C.A. 7); *Beckanstin* v. *United States*, 232 F. 2d 1 (C.A. 5); *Harrell* v. *United States*, 220 F. 2d 516 (C.A. 5).

The court's instruction did not preclude the jury from determining whether the answers were actually given by petitioners in response to questioning. The court made it clear both in its charge (R. 205-206) and in its supplementary instruction to the jury on this issue (R. 225-226) that "the questions and answers in

each of the three counts, in each of the two indictments" were material, *i.e.*, that the answers *alleged* to have been given were in fact material to the inquiry of the Internal Revenue Service. In other instances when the court referred to the answers which were the basis of the charge of perjury, it employed the qualifying term "alleged" in order to preclude any confusion between what had been charged and the facts at issue for the jury's determination (*e.g.*, R. 194, 197, 206, 213). The court did not suggest that the answers were in fact given, and the excerpt which petitioners cite (Pet. 8), taken in context, does not import such meaning (see the Statement, *supra*, p. 7). The court's extended charge to the jury (R. 185-211) clearly and fairly informed them that it was their province to determine whether the answers were in fact given (as well as all other elements of perjury), and that they must presume the accused innocent in every respect until proved guilty.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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